LCW Liebert Cassidy Whitmore

Fire Watch

News and developments in employment law and labor relations for California Fire Safety Management.

December 2018

INDEX

LCW NEWS

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FBOR

Tolling of Limitations Period Based on Criminal Investigation Continues until Final Determination is Made Not to Prosecute.

The Public Safety Officers Procedural Bill of Rights Act (POBR) provides that in order to impose punitive action against a public safety officer, an employing agency must investigate and notify the officer of the proposed discipline within one year of discovering the underlying misconduct. However, if the misconduct is also the subject of a criminal investigation or prosecution, the one-year limitations period tolls while the criminal investigation or prosecution is pending. (This tolling provision also applies to the one-year limitations period for misconduct investigations under the Firefighters Procedural Bill of Rights Act (FBOR).)

In *Bacilio v. City of Los Angeles*, the Court of Appeal addressed when the POBR's tolling period for criminal investigations ends, finding an investigation is no longer "pending" when a final determination is made not to prosecute and to close the investigation. The court explained, "[r]equiring that the determination not to prosecute be final, rather than interim, ensures that investigations are not prematurely placed back on [the POBR's] fast track while at the same time ensuring that an officer's right to speedy adjudication becomes paramount once a final determination is made."

The case involved Los Angeles Police Department officers Edgar Bacilio and Nestor Escobar. In response to a citizen's complaint filed on August 4, 2011, the LAPD immediately initiated an investigation against Escobar for sexual misconduct and against Bacilio for aiding and abetting Escobar's misconduct. On June 3, 2013, the LAPD presented its investigative findings to the district attorney, seeking criminal prosecution of Escobar.

On August 6, 2013, the deputy district attorney reviewing the matter told the LAPD's investigator that criminal charges against Bacilio were unlikely, but that she was still working on the case. Some weeks later, on October 3, 2013, the district attorney's office sent the LAPD a Charge Evaluation Worksheet officially declining to file charges against the subject officers due to insufficient evidence.

On September 20, 2014, the LAPD notified Bacilio that its internal affairs unit was seeking an official reprimand against him. Although less than a year had passed since the district attorney's office formally declined to prosecute Bacilio, the notice came more than a year after the deputy district attorney's verbal advisement to the LAPD's investigator regarding Bacilio.

Challenging his reprimand, Bacilio contended that the deputy district attorney's August 6, 2013 comments signaled the end of the criminal investigation, and thus the end of the POBR's tolling period. As such, Bacilio claimed, the LAPD's September 20, 2014 notice was untimely.

The Court of Appeal rejected Bacilio's argument, finding that the deputy district attorney's comments reflected an interim, rather than a final, decision. It concluded that "the district attorney's office did not make its final determination regarding prosecution until it issued its October 3, 2013 Worksheet declining to prosecute." The court placed emphasis on, among other things, the fact that the Worksheet was signed by a reviewing deputy, suggesting that "further review was necessary and that the prosecutor's earlier oral advisement was not definitive." The court ruled, therefore, that the LAPD complied with the POBR's one-year limitations period for notifying an officer of proposed discipline.

Edgar Bacilio v. City of Los Angeles, et al. (2018) 28 Cal. App.5th 717.

LABOR RELATIONS

PERB Affirms High Bar for Discipline Based on Untrue Statements.

Under the Meyers-Milias-Brown Act (MMBA), an employee's statements related to employer-employee relations are legally protected. They lose this protection only if they are so flagrant, defamatory, insubordinate, or made with malice that they cause a "substantial disruption of or material interference with" an agency's operations.

In this case, the County of Riverside terminated dispatch supervisor Wendy Thomas after a personnel investigation concluded that she had made false statements about her work conditions during a lawsuit she and her union brought against the County. The union then filed an unfair labor practice charge with the Public Employment Relations Board (PERB), claiming that Thomas' statements were protected by the MMBA and that her discipline therefore constituted unlawful retaliation based on protected activity.

Rejecting the decision by an Administrative Law Judge (ALJ) that the charge should be dismissed, PERB found that the County had not proven that Thomas knew any of her statements were false.

PERB relied on its prior decision in *Chula Vista Elementary School District*, in which it found that to lose statutory protection, the otherwise protected speech must be maliciously untrue. In other words, the false statement must be made "with knowledge of its falsity, or with reckless disregard of whether it was true or false."

PERB found the evidence in this case did not show that Thomas was maliciously dishonest in making the statements at issue. For example, PERB determined that some of

Thomas' statements were mere opinion (e.g., that she suffered "substantial hardship") and that others were not clearly false or could potentially be explained. PERB thus concluded that Thomas' statements were protected by the MMBA and that her termination violated the MMBA's prohibition on retaliation.

SEIU v. County of Riverside, (2018) PERB Dec. No. 2591-M.

NOTE:

As this decision indicates, the MMBA is very protective of employee comments relating to terms and conditions of employment. Proving that an employee's comments lose protection because they were intentional or reckless requires clear and convincing evidence that the employee knew the statements to be false.

WAGE AND HOUR

No Travel Time Pay for Employees Who Voluntarily Drove Company Vehicles During Commute.

Pacific Bell Telephone Company ("Pac Bell") employs technicians to install and repair residential video and internet services. Prior to 2009, Pac Bell required all technicians to pick up company vehicles loaded with equipment each day at a Pac Bell garage. Pac Bell paid technicians for time spent picking up the vehicle at the garage, loading it with equipment, and driving to the first work site. Pac Bell also paid technicians for time spent driving from the last customer worksite to the garage at the end of the work day, but did not pay them for time spent traveling to or from the garage and their homes at the start and end of their shifts.

In 2009, Pac Bell created a voluntary "Home Dispatch Program" ("HDP") that gave technicians the option to commute between their homes and work sites using a Pac Bell vehicle. Use of a company vehicle was not mandatory, and technicians had the option to use their own cars instead. Technicians participating in the HDP traveled to the garage once a week to load the Pac Bell vehicle with the necessary tools and equipment. Pac Bell paid technicians for the time spent driving the vehicle to the garage and loading it with equipment on a weekly basis. Technicians could drive the company vehicle home at the end of each work day, and drive from their home to their first work site the next day. Pac Bell did not pay technicians for time spent driving the company vehicle between their homes and work sites at the start or end of the work day.

Several technicians participating in the HDP sued, claiming they were entitled to pay for the time they spent driving a Pac Bell vehicle from their homes to and from their work site.

California Court of Appeals ultimately dismissed the technicians' claims.

First, it found that because Pac Bell did not *require* employees to participate in the HDP or use a company vehicle, technicians were not under Pac Bell's "control" during their commute between their home and work sites, and were not entitled to be paid for the time.

Pac Bell did place restrictions on technicians' personal activities while they were in a company vehicle. Pac Bell required technicians to use its vehicles only for company business and they could not: carry unauthorized persons as passengers; run errands; pick up or drop off their children; or talk on a cell phone while driving. But the Court found that these restrictions did not establish "control" as use of the company vehicle was still completely voluntary and not required.

The Court of Appeal also rejected the technicians' argument that payment for the commute was required since the technicians transported tools and equipment necessary for

their work. The Court of Appeal found that the technicians were merely "commuting with necessary tools in tow," which did not require additional time, effort, or exertion beyond what is required for commuting.

Hernandez v. Pacific Bell Telephone Company (2018) 29 Cal. App.5th 131.

NOTE:

The legal standards governing travel time and whether it is compensable, differ and depend upon the legal status of each public agency. The rules for Charter Cities and all Counties are governed by the FLSA. But the travel time rules for general law cities and special districts are governed by California wage and hour laws.

PUBLIC RECORDS

Agency Was Permitted to Recover Costs of Redacting Electronic Public Records.

The California Court of Appeal found that the California Public Records Act ("CPRA") permits a public agency employer to recover, from the requestor of public records, the actual costs to the agency of redacting information from electronic records in response to a request for electronically stored public records.

In this case, the National Lawyers Guild (NLG) requested from the City of Hayward electronic records related to a demonstration for which the City's Police Department provided security. NLG initially requested eleven categories of records including electronic and paper records. NLG made a second request for video recordings of police body camera footage from 24 named officers and additional unnamed officers.

The City complied with NLG's records requests. In response to the first request, the City produced more than six hours of body camera footage. City staff spent approximately 170 hours reviewing and redacting portions of the video that were exempt from disclosure under the CPRA. The task required the City to research and acquire a special software program to edit and redact the video recordings. The City sought reimbursement for $2,939.58 in costs incurred in copying and redacting the videos, including costs for City staff time spent reviewing and editing/redacting exempt portions of the requested video recordings and costs incurred in copying the videos. In response to NLG's second request for videos, the City offered to produce copies for $308.89, representing the City's production costs.

NLG filed a legal action seeking reimbursement for its payment of $2,939.58, and access to the second set of its requested videos for no more than the City's direct production costs. The parties agreed that the video recordings that NLG requested were subject to disclosure but disputed which party should bear the costs incurred in the production. The trial court granted NLG's request and the City appealed.

On review, the Court of Appeal recognized that a person's protected right of access to information regarding police conduct must sometimes yield to the personal privacy interests of others. The CPRA specifies that "if only part of a record is exempt, the agency is required to produce the remainder, if segregable."

Next, the Court of Appeal interpreted Government Code sections 6253 and 6253.9 of the CPRA. Section 6253 allows an agency to recover the direct costs of duplication (interpreted to cover, for example, photocopying costs and the expense of running the machine). Section 6253.9 requires government agencies that keep public records in an electronic format to make them available in electronic format and permits an agency to recover ancillary costs of producing public

records. The Court of Appeal found that the legislative history of the CPRA indicated that section 6253.9 was added to allow public agencies to recover, in addition to the direct costs of duplication, the costs of acquiring and utilizing computer programs "to extract exempt material from otherwise disclosable electronic public records."

Accordingly, the Court of Appeal concluded that the costs allowable under section 6253.9 included the City's expenses incurred to construct a copy of the police body camera video recordings for disclosure, including the cost of special computer services and programming used to extract exempt material from these recordings in order to produce a copy to NLG. The court remanded the case to the trial court for further proceedings on precisely which costs the City was entitled to recover under this standard.

National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al. (2018) 27 Cal.App.5th 937.

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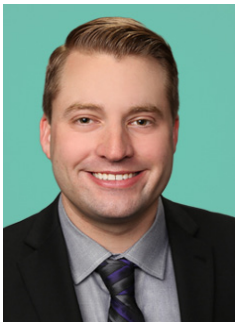
New to the Firm



Andrew Pramschufer is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he provides assistance to clients in matters pertaining to labor and employment law. Andrew has experience researching and drafting pleadings, motions, and memoranda, including demurrers, motions to dismiss, and motions for summary judgment. He also advises clients on remedial measures, including drafting settlement agreements and releases of liability. Andrew has appeared in court and assists with investigation claims, witness interviews, and witness preparation for deposition and trial. He can be reached at 310.981.2730 or apramschufer@lcwlegal.com.

Alexander (Alex) Volberding is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he provides assistance to clients in matters pertaining to labor and employment law and litigation. Alex has significant experience drafting and negotiating Project Labor Agreements (PLAs) on behalf of public sector clients throughout the state, as well as providing advice and counsel to clients regarding issues that arise under such agreements after adoption, including disputes about payments and threatened work stoppages. He can be reached at 310.981.2021 or avolberding@lcwlegal.com.

Casey Williams is an employment litigator and nonprofit business attorney, based in Liebert Cassidy Whitmore's San Francisco office. Her dynamic practice is focused on helping mission-driven organizations achieve their goals while staying compliant and working through complex disputes. She can be reached at 415.512.3018 or cwilliams@lcwlegal com.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Jan. 9 **"Supervisor's Guide to Public Sector Employment Law"**
Gold Country ERC | Placerville & Webinar | Jack Hughes

Jan. 10 **"Maximizing Performance Through Evaluation, Documentation and Discipline" and "The Art of Writing the Performance Evaluation"**
East Inland Empire ERC | Fontana | Christopher S. Frederick

Jan. 10 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Gateway Public ERC | Santa Fe Springs | Kristi Recchia

Jan. 10 **"Public Sector Employment Law Update"**
North State ERC & San Diego ERC & San Mateo County ERC | Webinar | Richard S. Whitmore

Jan. 16 **"Management Guide to Public Sector Labor Relations"**
South Bay ERC | Manhattan Beach | Melanie L. Chaney

Jan. 16 **"Public Sector Employment Law Update"**
Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore

Jan. 17 **"Advanced FSLA" and "Public Sector Employment Law Update"**
Coachella Valley ERC | La Quinta | Elizabeth Tom Arce

Jan. 17 **"Labor Negotiations from Beginning to End"**
LA County HR Consortium | Los Angeles | Adrianna E. Guzman

Jan. 17 **"Preventing Workplace Harassment, Discrimination and Retaliation" and "Moving Into the Future"**
West Inland Empire ERC | Diamond Bar | Kevin J. Chicas

Customized Training

Jan. 10 **"Reasonable Suspicion: Drugs and Alcohol"**
Ventura County Fire District | Camarillo | James E. Oldendorph

Jan. 15 **"Bias in the Workplace"**
ERMA | Cathedral City | Jennifer Rosner

Jan. 15 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Las Gallinas Valley Sanitary District | San Rafael | Morin I. Jacob

Jan. 18 **"Embracing Diversity"**
Los Angeles Conservation Corps | Jennifer Rosner

Speaking Engagements

Jan. 9	**"The Leadership Role of Finance and FLSA Compliance"** California Society of Municipal Finance Officers (CSMFO) Annual Conference | Palm Springs | Brian P. Walter & Lori Sassoon
Jan. 10	**"Strategies to Manage Increasing Pension Costs"** CSMFO Annual Conference | Palm Springs | Steven M. Berliner & Monica Irons
Jan. 10	**"Legal Update"** International Public Management Association for HR (IPMA) Sacramento-Mother Lode Chapter Meeting | Roseville | Gage C. Dungy
Jan. 16	**"What Public Procurement Officials Need to Know About California's New Independent Contractor Test"** California Association of Public Procurement Officers (CAPPO) Conference | Sacramento | Kristin D. Lindgren
Jan. 28	**"Performance Management - Evaluation, Documentation and Discipline" and "The Art of Writing the Performance Evaluation"** National Association of Housing and Redevelopment Officials (NAHRO) | Napa | Kristin D. Lindgren
Jan. 30	**"Legal Update"** Inland Empire Public Management Association for Human Resources (IEPMA-HR) | Riverside | J. Scott Tiedemann
Jan. 30	**"AB 1661 Training"** League of California Cities New Mayors and Council Members Academy | Irvine | Laura Drottz Kalty

Seminars/Webinars

Jan. 23	**"Costing Labor Contracts"** LCW Conference 2019 | Palm Desert | Peter J. Brown & Kristi Recchia
Jan. 24-25	**"2019 LCW Conference"** Liebert Cassidy Whitmore | Palm Desert

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LCW Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor | Los Angeles, CA 90045
CalPublicAgencyLaborEmploymentBlog.com | @lcwlegal

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